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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS O. ROBINSON, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a prosecutor may rebut closing defense argument attacking the fairness of the prosecution and asserting that the government had not afforded the defendant an opportunity to explain his actions, by responsive argument, approved in advance by the district court, referring to the defendant's failure to testify.

2. Whether, assuming the remarks were improper, the court of appeals nevertheless erred in reversing the conviction when respondent did not object to the remarks, either at the bench conference at which the district court authorized the responsive argument or when the argument was presented to the jury.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, respondent was convicted on two counts of mail fraud, in violation of 18

U.S.C. 1341 and 2.[1] Each count was in connection with a fire and subsequent insurance claim. He was sentenced to a five-year term of imprisonment, all but five months and 29 days of which was suspended in favor of a five-year term of probation. The court of appeals reversed (App., *infra*, 1a-13a).

1. The evidence at trial showed that in early 1979 respondent leased a truck stop in Guthrie, Kentucky, and purchased a $31,000 fire insurance policy on a wrecker and the contents of the truck stop's garage (Tr. 309-310, 317-319). On August 30, 1979, respondent increased the insurance coverage on the garage contents from $31,000 to $50,000. Two days later, on September 1, 1979, there was an explosion and fire in the garage. Respondent subsequently submitted an $80,000 insurance claim for the loss of the wrecker and the contents of the garage and an adjoining office. Tr. 318-319, 341, 344.

Earlier in 1979, respondent told a man whom he had solicited to become a partner in the truck stop that if the business turned out to be unsuccessful, he had a large inventory and could burn it (Tr. 485-487). Respondent was consistently delinquent on his rent, and by September 1979 his business had significantly deteriorated (Tr. 313, 359, 495, 512-513).[2] According to a local

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[1] Respondent was tried together with his wife, Aleida L. Robinson. She was convicted on one mail fraud count and was sentenced to two years' probation. The court of appeals affirmed her conviction (App., *infra*, 11a-13a). Both respondent and Mrs. Robinson were acquitted on two counts of making false statements to a bank for purposes of obtaining a loan, in violation of 18 U.S.C. 1014. At the close of the evidence at trial, the district court dismissed two other counts charging respondent with making and possessing a destructive device, in violation of 26 U.S.C. 5861.

[2] As of September 1979, respondent's gasoline supplier held bad checks totailing $28,000 provided by respondent (Tr. 495, 499).

police officer who had previously worked for him, respondent abruptly removed his race car and personal tools from the garage two or three weeks prior to the fire (Tr. 361-363).

The day after the fire, respondent's insurance agent, Aaron Williams, inspected the burned-out areas. Williams observed that tools and equipment he had previously seen in the garage were missing, that respondent's insured wrecker, which was usually parked in front of the truck stop, had been destroyed in the fire, and that respondent's uninsured race car, which was normally kept in the garage, had not been damaged. Williams also observed that the office area of the garage did not contain the remains of a color television, an adding machine, or a copying machine that respondent later claimed he had lost in the fire. Tr. 322-323. Shortly thereafter, investigators discovered that a "tremendous amount" of fire accelerant had been poured on the floor where the fire had started and that a desk in the office area contained no files or debris of any kind (Tr. 442-443, 457-458, 476-484).

During the next several weeks, respondent requested salesmen with whom he dealt to prepare false invoices showing that he had purchased an air compressor and over $10,000 worth of tires, so that he could submit them as part of his proof of loss to the insurance company (Tr. 410-417, 429-430; Gov. Exhs. 24 & 25).

Approximately a year later, on August 21, 1980, respondent's house in nearby Clarksville, Tennessee was heavily damaged by arson about an hour after respondent had left the premises with a large U-Haul truck filled with most of his household furnishings (Tr. 50-51, 252-260, 267). Firefighters and investigators inspected the premises shortly after the blaze had been extinguished. They discovered that a large, two-handled cooking pot containing gasoline had been left on a lit

stove, that an electric fan had been left running near an air vent, and that "rapid rise" gasoline had been spread throughout the house. They also determined that the doors and windows were locked, that the house was sparsely furnished, and that there was nothing in most dresser drawers or in any of the closets, except for empty hangers and a few garments in one closet. Tr. 59-60, 64-65, 70-74, 78-85, 91, 99-107, 131-132. The authorities later learned that the home security system had been turned off and disconnected from the electrical system prior to the blaze (Tr. 154-156, 214).

During the month preceding the fire at his home, respondent had packed family belongings, moved household furnishings from his house, and held a yard sale that was attended by several neighbors (Tr. 182, 190, 202, 212, 226, 252). Respondent explained to one neighbor that he was moving his family to California, but he told another neighbor that they were going there for a visit (Tr. 183, 204).[3] Two or three days before the fire, respondent began loading his household furnishings into a large U-Haul truck with the help of a 17-year-old neighbor, Christopher Edwards.[4] Edwards also helped respondent move older furniture and appliances from the garage into the house. Tr. 257. The day before the fire, Edwards' 11-year-old brother saw respondent draining gasoline from his race car into a large, two-handle cooking pot (Tr. 232-233). During the early morning hours immediately before the fire, Edwards helped respondent load the truck with clothing, beds, a grandfather clock, a dining room set, a master bedroom set, a microwave oven, and a double-door refrigerator-freezer filled with meat (Tr. 256-266). Edwards re-

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[3] Three days before the fire, respondent filed a change of address form with the post office (Tr. 277-278).

[4] On August 16, 1980, five days before the fire, respondent rented a 24-foot U-Haul truck—U-Haul's largest truck, designed to accommodate eight rooms of furniture (Tr. 163-164).

mained with respondent and his family until sometime after 3:00 a.m., when they were ready to leave for California. While Edwards and respondent's family waited outside, respondent remained alone in the house for five to ten minutes. After respondent left the house, he and his family departed in the U-Haul truck and an automobile, and Edwards went straight home, arriving there between 4:00 and 4:30 a.m. Less than an hour later, neighbors discovered that respondent's house was on fire. Tr. 214, 227, 230, 266-267.

Several weeks later, respondent contacted the company that insured his Clarksville house. He stated that his family had left Clarksville to vacation in California, but that they had decided to remain there because of the fire. Tr. 135-137. He provided the company with a list of property allegedly lost in the blaze (Tr. 137-139; Gov. Exh. 16). When he was interviewed by investigators the following month, he denied that he had set fire to his Clarksville house or that he had removed clothing and most of the furnishings from the house. He explained that he had locked all the doors and checked that the stove and fans were off before leaving the house, and that he had moved "some things" to California for his daughter, who was attending college there. Gov. Exh. 15.[5] Subsequently, respondent mailed the insurance company a proof of loss statement and a claim for $200,000, including a $106,500 personal property claim (Tr. 137-140; Gov. Exh. 18). Property that respondent had removed from his Clarksville house and included in his insurance claim was later discovered by authorities in his California residence (Tr. 177-178, 183-185, 203, 215-219, 235-243, 260-266, 381).[6]

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[5] A tape recording of that interview was introduced into evidence (Gov. Exh. 15).

[6] Tools that respondent had removed from the truck stop's garage prior to the fire there were also discovered in respondent's California residence (Tr. 368-372).

The evidence for the defense consisted of the testimony of two of respondent's children (Tr. 515-562, 596-609) and a neighbor (Tr. 562-589) concerning the events surrounding the fires and the various items left in Tennessee or taken to California, and of a business associate (Tr. 589-596) that respondent had been current in his business dealings and that respondent said he intended to return to Clarksville two weeks after going to California. Neither defendant testified.

4. In closing argument, the prosecutor summarized the evidence against the defendants (Tr. 615-637). The two attorneys who jointly represented the defendants divided the defense summation. The first attorney essentially confined his remarks to an analysis of asserted weaknesses in the government's case (Tr. 637-656). The other defense attorney, however, began his closing argument by contending that the government had breached its duty to be fair to the accused and to "play[] straight" with the jury (Tr. 658). He repeatedly returned to that theme, arguing that the government had unfairly "filtered" the evidence and used a particular witness in order to "imply something sinister" about respondent's conduct (Tr. 662, 667-668, 674, 676). In addition, five different times in his summation, defense counsel charged that the government had unfairly denied respondent an opportunity to "explain" his actions. Near the conclusion of his argument, counsel stated: "Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community, rather than before the agents?" Tr. 671-672.[7] Defense counsel also attempted to infer weak-

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[7] Defense counsel made other comments in a similar vein:

> By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to ex-

nesses in the prosecution's case by pointing out the lack of evidence of "more situations where there have been false claims, rather than one or two for Kentucky" (Tr. 676), despite the fact that the prosecution had attempted unsuccessfully, on several occasions, to introduce such evidence (Tr. 141-148, 207-208, 351-352).

After the defense summation the jury was excused from the courtroom. Out of the presence of the jury, the prosecutor then objected to defense counsel's contention in summation that the government had not given respondent a chance to "explain." He requested leave to rebut that contention, arguing that the defense had "opened the door" on that issue (Tr. 680-681). Despite ample opportunity to defend his actions or to object to the proposed rebuttal, defense counsel remained silent. The district court, considering both the prosecutor's right to reply and the accused's privilege against compulsory self-incrimination, ruled that in rebuttal the prosecutor could answer respondent's contention that he had been afforded no opportunity to explain. The court stated (Tr. 681):

> Yes Mr. Washko, I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting upon the defendant's failure to

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plain about these sorts of things, about mail fraud? [Tr. 670].

Did they ever give this man an opportunity in their many, many statements they took at the time to say "Well, I had two bedroom sets" [Tr. 670].

* * * * *

When he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson. * * * They never gave him a chance to explain [Tr. 670-671].

* * * * *

Now, here is what the Government, to be fair with the jury, should have done. They should have taken those items in the Kentucky inventory and just proved them. Why let the defendant disprove them, give him an opportunity to explain? [Tr. 674].

> testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.
>
> That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury.
>
> We might get reversed on it. Mr. Durham opened the door not less than four times in his argument on that question. I will let you comment on it in response.

Defense counsel made no objection.

The prosecution also sought permission to inform the jury that the government, contrary to defense assertions, had attempted to bring in evidence of other false claims (Tr. 682). Defense counsel objected to that request, and it was denied (Tr. 682-683).

In accordance with the ruling he had obtained from the court, the prosecutor began his closing argument with a rebuttal to the defendant's attack on the government's conduct, including the following (Tr. 685):

> [Defense counsel] has made comments to the extent the government has not allowed the defendants an opportunity to explain. It is totally unacceptable.
>
> He explained himself away on tape right into an indictment. He explained himself to the insurance investigator, to the extent that he wanted to.
>
> He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

Defense counsel made no objection to those remarks and did not request any cautionary instructions. The trial court later instructed the jury that a defendant has

no burden to produce any evidence and that "no inference whatever may be drawn from the election of a defendant not to testify" (Tr. 694).[8] Defense counsel stated they had no objections to the court's instructions (Tr. 719-720).[9]

The court of appeals reversed respondent's conviction on the basis of the prosecutor's rebuttal, holding that the prosecution does not have a right to make "direct comment on a defendant's failure to testify * * *, even if defense counsel has baited the prosecutor" (App., *infra*, 6a). The court distinguished *United States* v. *Roberts*, 548 F.2d 665 (6th Cir. 1977), and *Cook* v. *Bordenkircher*, 602 F.2d 117 (6th Cir. 1979), cited by the government, on the ground that they involved "indirect" comments on the accused's failure to testify (App., *infra*, 6a). Finally, the court held that the error was not cured by the trial court's jury instructions and that, notwithstanding that the government's "evidence

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[8] The court's instructions included the following (Tr. 694, 698):

> The law does not require a defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a defendant not to testify. The Government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.
>
> * * * * *
>
> The jury will also keep in mind this: The law never imposes upon defendants in criminal cases the burden or duty of calling any witnesses or producing any evidence, and no adverse inference may be drawn from their failure to do so.

[9] Defense counsel had argued in summation that the jury could not draw any adverse inference from the defendants' failure to take the stand (Tr. 678-679).

is strong," the error was not harmless beyond a reasonable doubt (*id.* at 6a, 10a).[10]

REASONS FOR GRANTING THE PETITION

Respondent's convictions of mail fraud and aiding and abetting were reversed by the court of appeals because of a comment made by the prosecutor during rebuttal argument. The comment was in direct response to improper argument by defense counsel to the jury that the prosecution had unfairly denied respondent an opportunity to "explain" his actions. Before making the comment, the prosecutor sought and obtained advance sanction from the district court at a hearing out of the presence of the jury. Though having the opportunity to object, defense counsel did not do so, either at the hearing or when the comment was made. Despite the lack of timely objection, the court of appeals noticed the error and reversed, without making any express finding of prejudice to the defendant, other than to determine that the comment did not constitute harmless error.[11]

The decision thus raises two of the issues also raised by the petition for a writ of certiorari in *United States* v. *Billy G. Young*, No. 83-469.[12] The decision conflicts with decisions of this Court and other courts of appeals concerning the prosecution's right to reply to improper arguments by the defense (see *Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958)) and the defendant's obligation to object to improper remarks by the prosecutor

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[10] The court of appeals affirmed Mrs. Robinson's conviction on the ground that the prosecutor's remarks were a reference only to respondent's failure to testify and thus did not taint the fairness of her conviction (App., *infra*, 11a-13a).

[11] The court also stated, without elaboration, that "[t]he error was not cured, moreover, by the court's later jury charge." App., *infra*, 6a.

[12] A copy of the petition in *Young* has been provided to respondent.

at trial (see *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940)). The court's departure from established principles governing prosecutorial response and the preservation of issues for appeal exacerbates the burden on the criminal justice system and the courts, with little discernible contribution to the fair treatment of the accused. We therefore submit that the decision warrants review by this Court. Because the principles that control the disposition of these issues are relatively well settled, the Court may deem summary reversal appropriate.

1. This Court in *Lawn*, joined by most of the courts of appeals, has held that the prosecution may respond in rebuttal to improper arguments by defense counsel, even though such response might not be permissible in the absence of such provocation. See cases and authorities cited in the petition for certiorari in *United States* v. *Billy G. Young*, No. 83-469, at 12-13. Many federal appellate decisions have recognized this "invited response" doctrine in precisely the circumstance presented here—argument touching on the accused's failure to testify. See, *e.g.*, *United States* v. *Males*, No. 82-5851 (11th Cir. Sept. 22, 1983), slip op. 5033-5034; *United States* v. *Kennedy*, No. 81-1066 (9th Cir. Sept. 2, 1983), slip op. 4227; *United States* v. *Roberts*, 548 F.2d 665, 668-669 (6th Cir. 1977); *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269-1270 (2d Cir. 1969); *United States* v. *Nasta*, 398 F.2d 283, 285 (2d Cir. 1968); *United States* v. *Hoffa*, 349 F.2d 20, 50-51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966); *Baker* v. *United States*, 115 F.2d 533, 544 (8th Cir. 1940), cert. denied, 312 U.S. 692 (1941); see also *Doyle* v. *Ohio*, 426 U.S. 610, 619-620 n.11 (1976);[13]

[13] In *Doyle*, this Court acknowledged that it would be proper for a prosecutor to comment on the accused's post-arrest silence where the accused testified that he had provided an exculpatory version of the events to the police upon arrest. In such a case,

United States v. *Mavrick*, 601 F.2d 921 (7th Cir. 1979).[14]

The district court's approval of the prosecutor's rebuttal in this case was fully consistent with these precedents. During summation, defense counsel repeatedly argued that the prosecution had breached its duty of fair play, stating at least five times that the government had not given defendant an opportunity to "ex-

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the prosecution's reference to the defendant's silence is used not to raise an inference of guilt or to impeach his credibility, but simply to rebut an untrue statement or inference by the defense. *United States* v. *Dixon*, 593 F.2d 626, 630 (5th Cir. 1979). Similarly, in this case the prosecution's comment that defendant had the opportunity to explain to the jury directly refuted defendant's unsupported assertions that he had been denied such opportunity to explain.

[14] The *Mavrick* decision, though involving post-arrest silence rather than failure to testify at trial, is closely analogous to the instant case. In *Mavrick*, the defendant testified at trial that he had been denied any opportunity at the time of his arrest to explain his conduct, whereas in fact he had chosen, following *Miranda* warnings, not to answer any questions without an attorney present. On cross-examination, the prosecutor questioned him further concerning both his immediate post-arrest silence and his continuing failure to explain to police officers. Acknowledging that "such an inquiry may ordinarily be improper because it tends to elicit testimony about the defendant's silence" (601 F.2d at 933), the court of appeals found "nothing fundamentally unfair to the defendant in permitting the government to correct an impression that the defendant created by his own testimony." *Ibid.* It did not matter that the defendant's testimony on direct examination concerned only his immediate post-arrest silence, while the prosecutor questioned him about his later silence as well. The court stated: "Having raised the question of his opportunity to explain to police officers, he 'opened the door to a full and not just a selective development of that subject.'" *Ibid.*, quoting *United States* v. *Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975). Here, too, respondent raised the issue of his opportunity to explain his actions, and thereby "opened the door" to an appropriate response by the prosecutor in rebuttal.

plain" his actions. Tr. 670, 670-671, 671, 671-672. Accordingly, after consultation with defense counsel and the trial judge out of the presence of the jury, the prosecutor began his rebuttal with a defense of government conduct, including the challenged remark, quoted above at page 8. The prosecutor did not suggest in any way that the jury should infer respondent's guilt from his failure to testify; the only point made was that the government had discharged its obligation of fair play. This measured response, neither repeated nor emphasized during the remainder of the rebuttal, was clearly "rebuttal language suitable to the occasion" (*United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973)) and within the right of reply recognized in *Lawn*.

The court of appeals, however, denied "that a direct comment on a defendant's failure to testify can be made, even if defense counsel has baited the prosecutor" (App., *infra*, 6a). Although the court stated that it could "comprehend the desire of the district court to give 'equal time,' as it were, to the Government," it found the prosecutor's response "impermissible under the fifth amendment" (*ibid.*). The court purported to distinguish *United States* v. *Roberts*, *supra*, on the ground that *Roberts* involved an "indirect" and the instant case a "direct" comment on the defendant's failure to testify.[15] The distinction is spurious in this context, however; none of the cited cases makes any such distinction. Rather, the determinative factors in the "invited response" cases are: (1) the logical relation between the challenged comments and the defense

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[15] The court also distinguished *Cook* v. *Bordenkircher*, 602 F.2d 117 (6th Cir. 1979), on the same basis, though *Cook* involved a prosecutor's attacks on the defendant's character rather than a comment on his failure to testify (*id.* at 120).

statements that provoked them;[16] and (2) the appropriateness of the response in light of the nature of the defense statements.[17] The measure of the response is the provocation. The court of appeals' novel rule prohibiting "direct" comments on a defendant's failure to testify is out of place when the defense has itself "directly" raised the issue.[18] Here, the appropriate response to defense counsel's groundless charge that defendant had been denied an opportunity to "explain" his actions was

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[16] For example, in *United States* v. *West*, 680 F.2d 652, 655-656 (9th Cir. 1982), the court recognized the "invited response" doctrine but found that the government's comments were not logically connected to the defense comments that supposedly invited them. By contrast, in *La Sorsa*, 480 F.2d at 526, the court found that "[t]he defense had, indeed, insinuated precisely the type of prosecutorial misconduct which the prosecutor was attempting to refute in his argument to the jury."

[17] For example, in *Socony-Vacuum*, 310 U.S. at 242, this Court determined that the "subject matter" of the prosecutor's remarks was "certainly relevant" to the defendants' argument to the jury, but found that the remarks nonetheless "overstep[ped] the bounds." Courts have recognized that "even egregious remarks will not necessarily require reversal of a conviction" where the prosecutor's remarks "were invited by the equally egregious conduct of * * * defense counsel" (*United States* v. *Harrison*, Nos. 82-5031 & 82-5087 (4th Cir. June 10, 1983), slip op. 3-4); yet the persistence and emphasis of the prosecutor's argument are significant factors in determining whether there was reversible error. *Ibid.*; see also *United States* v. *Elmore*, 423 F.2d 775, 781 (4th Cir.), cert. denied, 400 U.S. 825 (1970).

[18] Even granting the court's distinction between "direct" and "indirect" comments on the defendant's failure to testify, its application of that principle is difficult to understand. The prosecutor's comments here were "directly" addressed to the government's fair play, and only "indirectly" related to defendant's failure to testify. Cf. *United States* v. *Robinson*, 651 F.2d 1188, 1197-1198 (6th Cir. 1981). This suggests that the court's purported distinction, if adopted, might well lead to inconsistent results.

to state that defendant had in fact been granted such an opportunity.[19] "Having raised the question of his opportunity to explain * * *," defendant "'opened the door to a full not just a selective development of that subject.'" *Mavrick*, 601 F.2d 933, quoting *United States* v. *Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975).[20] And the character of the prosecutor's response in this case can hardly be criticized; indeed, the prosecutor's decision to seek an advance ruling on the proposed response from the district court and the straightforward, noninflammatory statement itself were models of responsible prosecutorial practice. The reversal of this conviction is thus an unprecedented and unjustifiable interference with legitimate prosecutorial practice.

The court's contraction of the prosecution's right of reply to improper defense arguments is particularly troublesome in the context of comment on the accused's failure to testify, because it stretches the accused's protections against such comment well beyond their purpose and proper scope. *Griffin* v. *California*, 380 U.S. 609 (1965), prohibited adverse comment on the refusal to testify because it could be "a penalty imposed by

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[19] It is no answer to say that the prosecutor should have objected to defense counsel's improper argument. Cf. *United States* v. *Young*, No. 81-1536 (10th Cir. Feb. 22, 1983) (reprinted as App. A in the petition for a writ for certiorari in No. 83-469, at 11a). The prejudice to the government from defense counsel's allegations of unfairness could not have been cured by a corrective instruction from the court without the court bringing out that defendant had in fact been given an opportunity to "explain" his actions to the jury. Indeed, any curative instruction would have been little different from the prosecutor's own statement in rebuttal. See also 83-469, at 16 n.17.

[20] Thus, the prosecutor's response was appropriate even if defense counsel's arguments were interpreted—contrary to the understanding of the prosecutor and the district judge—to refer only to defendant's lack of a chance to explain to agents prior to trial. *Mavrick*, 601 F.2d at 933.

courts for exercising a constitutional privilege." 380 U.S. at 614; see *Carter* v. *Kentucky*, 450 U.S. 288, 301 (1981). As subsequent decisions bear out, not *all* comment by a judge or prosecutor on the defendant's failure to testify is proscribed. See *Lakeside* v. *Oregon*, 435 U.S. 333, 338 (1978). The *Griffin* Court was "concerned only with *adverse* comment" (*id.* at 338; emphasis in original)—*i.e.*, with suggestions that "adverse inferences are to be drawn from the exercise of [the] privilege [against self-incrimination]." *Carter* v. *Kentucky*, 450 U.S. at 305. Where the jury is not invited to draw an inference of defendant's guilt from his failure to testify, and where the prosecution's reasons for commenting on such failure are legitimate and unrelated to any intent to compel self-incrimination or extract a penalty for failure to testify, the defendant's rights under the Fifth Amendment have not been infringed. See *Butler* v. *Rose*, 686 F.2d 1163, 1169-1170 (6th Cir. 1982) (en banc).

The circumstances of this case serve as an apt example. In the context of defense counsel's repeated charges of prosecutorial unfairness, the prosecutor's unembellished statement that "[respondent] could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain" (Tr. 685) is unlikely to have been understood by the jury as suggesting an "inference of guilt for failure to testify" (*Griffin*, 380 U.S. at 614). Any such possibility would, moreover, have been dispelled by the court's instructions to the jury (page 9 note 9, *supra*); see *Taylor* v. *Kentucky*, 436 U.S. 478, 484-486 (1978). This Court has cautioned that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly* v.

DeChristoforo, 416 U.S. 637, 647 (1974). Remarks of this sort constitute reversible error only if "'the prosecutor's manifest intention was to comment upon the accused's failure to testify' or [if] the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States* v. *Robinson*, 651 F.2d 1188, 1197 (6th Cir. 1981) (quoting *United States* v. *Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977)).[21] No reversal is justified "if some other explanation for his remark is equally plausible." *Robinson*, 651 F.2d at 1197 (quoting *Rochan*, 563 F.2d at 1249).[22]

Thus, the court's failure to recognize the prosecutor's right of reply in this case resulted in finding an error where no jury is likely to have drawn an inference adverse to the defendant.[23] The rationale of *Griffin* does not apply where, as here, the prosecutor's comment is made specifically to refute an improper argument by the defense, and not to extract a penalty for the defendant's failure to testify.

Accordingly, the decision below, like that in *Young*, is in conflict with this Court's decision in *Lawn* and with the "invited response" doctrine generally followed by the other circuits. It should be reviewed by this Court.

2. Even assuming arguendo that the court below was correct in finding the prosecutor's rebuttal argument

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[21] This test has been adopted by every circuit. See *Butler* v. *Rose*, 686 F.2d at 1170, and cases there cited.

[22] The court of appeals seemed to recognize this principle (App., *infra*, 6a), but failed to apply it.

[23] Of course, a jury may infer guilt from the failure of the accused to testify, even "given no help from the court [or the prosecution]." *Griffin*, 380 U.S. at 614. But the prosecutor's defense of government fairness in this case can hardly be interpreted as "solemniz[ing] the silence of the accused into evidence against him." *Ibid.*

improper, the court nevertheless erred in holding that the comment, to which respondent did not object during the hearing out of the presence of the jury or during the trial itself, was a proper ground for reversal on appeal. As discussed in the pending petition for certiorari in *Young*, No. 83-469, at 16-20,[24] this Court has held that "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *Socony-Vacuum*, 310 U.S. at 238-239; see also *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982); *Crumpton* v. *United States*, 138 U.S. 361, 364 (1891). Only when the reviewing court concludes that the error is "obvious" or that it would "otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings" may the court notice the error and reverse. *Socony-Vacuum*, 310 U.S. at 239, quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); accord, *Frady*, 456 U.S. at 163 n.13; see Fed. R. Crim. P. 52(b).

The decision below presents a particularly striking instance of disregard for this contemporaneous objection requirement. Before making his rebuttal argu-

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[24] To the cases and authorities cited in that petition should be added the recent decision in *United States* v. *Kennedy*, No. 81-1066 (9th Cir. Sept. 2, 1983), slip op. 4226, which holds that "[b]ecause [defendant] neither objected to the prosecution's statements nor asked for a specific curative instruction, there must be plain error to afford a basis for reversal. * * * [W]e reverse a criminal conviction on the basis of plain error in the very exceptional situation only, situations wherein it appears to be necessary in order to prevent miscarriages of justice or to preserve the integrity and reputation of the judicial process" (quoting *United States* v. *Giese*, 597 F.2d 1170, 1199 (9th Cir.), cert. denied, 444 U.S. 979 (1979)). The unobjected-to error in *Kennedy*, as in this case, was the prosecutor's reference to the defendant's failure to testify.

ment, the prosecutor raised the issue before the court out of the presence of the jury to determine the extent of permissible response to defense counsel's repeated charges of government unfairness. Defense counsel was present and had every opportunity to object to the proposed response. He remained silent.[25] The district court, considering both the prosecution's right of reply and the defendant's privilege against self-incrimination, permitted the prosecutor to "say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury" (Tr. 681). Again, defense counsel lodged no objection. In the courtroom, the defense continued its silence as the prosecutor delivered the now-challenged comment in rebuttal. Respondent did not even request cautionary instructions, but specifically stated that he had no objection to the court's proposed charge to the jury. Tr. 720.

The requirement of contemporaneous objection applies with particular force in these circumstances. Respondent can hardly claim that his failure to object was due to the fast pace of litigation or the fear of further emphasizing the prosecutor's comments in the minds of the jury. Cf. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1270 (2d Cir. 1969). Defense counsel's deliberate silence in the face of repeated opportunities to object suggests a degree of gamesmanship. But as one judge has observed:

> [C]ounsel have a duty to the court, an obligation at least to permit the judge to conduct a trial that

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[25] By contrast, before the jury had returned, the prosecution made an additional request to inform the jury that it had attempted to bring in proof of other fraudulent insurance claims. Defense counsel objected, and the request was denied. Tr. 682-683. Under the circumstances, it seems clear that any right of objection to the prosecutor's comment on defendant's opportunities to explain his actions was knowingly waived.

> finally determines the question at issue. A defendant may not remain silent in response to error and take his chances with the verdict before moving for a mistrial. Nor may he permit error to go unchallenged, then ask the appellate court to reverse the conviction.

United States v. *West*, 680 F.2d 652, 658 (9th Cir. 1982) (Wright, J., concurring); see also *United States* v. *Kravitz*, 281 F.2d 581, 587 (3d Cir. 1960), cert. denied, 364 U.S. 941 (1961).

In any event, the prosecutor's remark in rebuttal simply did not rise to the level of a "miscarriage[] of justice" that would justify reversal despite defendant's failure to object. *Frady*, 456 U.S. at 163. If error at all, the remark was exceedingly close to the line, and the prosecutor's scrupulous protection of defendant's rights by seeking a conference out of the presence of the jury cannot be said to "seriously affect"—other than to enhance—"the fairness, integrity or public reputation of judicial proceedings." *Socony-Vacuum*, 310 U.S. at 239.

Moreover, as the court of appeals impliedly found, the prosecutor's remark could have had relatively little prejudicial effect on respondent; therefore it could not be said to "affect [his] substantial rights." Fed. R. Crim. P. 52(b). The government argued in the court of appeals that the error, if any, was harmless beyond a reasonable doubt. Applying that exacting standard, and recognizing that "the evidence is strong as to both defendants" (App., *infra*, 10a), the court concluded that "the government has failed to tip the scales as to defendant Thomas Robinson, Jr." (*ibid.*)[26] Further demonstrating how marginal the prejudice was to the

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[26] In light of the overwhelming evidence adduced at trial, especially with respect to the Clarksville fire, we are frankly at a loss to understand how the court of appeals arrived at this conclusion. Nevertheless, we do not ask this Court to review the fact-specific holding on the harmless error issue.

defendant, the court concluded that the error was harmless beyond a reasonable doubt as to his wife and co-defendant, who also had failed to testify (*id.* at 11a-13a). Any error that is so close to being harmless beyond a reasonable doubt necessarily falls far short of constituting a "miscarriage of justice" warranting reversal in the absence of a timely objection.[27]

As explained in our petition for a writ of certiorari in *Young* (at 20), an improper closing argument by the prosecution, not objected to at trial, is inherently unlikely to warrant reversal on appeal. Here, the court of appeals' discussion of harmlessness impliedly acknowledges that reversal was not warranted. Moreover, the trial court's instruction to the jury on the defendant's right to remain silent and on the government's burden of proof of guilt beyond a reasonable doubt surely cured any misunderstandings the prosecutor's rebuttal might have created in the jurors' minds. See *Carter* v. *Kentucky*, 450 U.S. at 301-303; *Taylor* v. *Kentucky*, 436 U.S. at 484-486; *Donnelly* v. *DeChristoforo*, 416 U.S. at 644. As this Court has stated, appellate consideration of a trial court error such as this—if it was error—is "extravagant protection." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.12 (1977); *Namet* v. *United States*, 373 U.S. 179, 190 (1963). It is extravagance our criminal justice system can ill afford.

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[27] Prejudice to the defendant from the prosecutor's remark is also exceedingly unlikely in light of defense counsel's own summation, which dwelt at length on respondent's failure to testify (Tr. 678-679) and even pointed out to the jury that "[i]t is natural for people who are innocent to take the witness stand" (Tr. 679), and that "it is beyond our usual and customary experience" not to draw an adverse inference from a person's failure to tell his own story (*ibid.*). Where "[the defendant's] own counsel had clearly focused the jury's attention on [defendant's] silence, * * * it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created." *Lockett* v. *Ohio*, 438 U.S. 586, 595 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1983

APPENDIX

No. 82-5366

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS O. ROBINSON, JR., AND ALEIDA ROBINSON,
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the Middle District of Tennessee.

Decided and Filed September 7, 1983

Before: KEITH and WELLFORD, Circuit Judges; COHN, District Judge.*

WELLFORD, Circuit Judge. Defendants-appellants appeal their convictions by a jury in the United States District Court for the Middle District of Tennessee (Wiseman, J.) of mail fraud, 18 U.S.C. § 1341, and aiding and abetting, 18 U.S.C. § 2. The question is whether reversible error occurred at trial when the prosecutor was permitted by the court to comment on the failure of one of the defendants to take the stand in his own defense. We find that the misconduct deprived the defendant Thomas Robinson, Jr., of a fair trial under the Fifth Amendment and 18 U.S.C § 3481, and there-

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

fore reverse his conviction.[1] Because we find that the error did not affect the trial of Aleida Robinson, we affirm her conviction.

Thomas Robinson, Jr., was convicted of two counts of mail fraud based on two separate fires and insurance claims and was sentenced to two five-year concurrent sentences, which were suspended except for five months and 29 days. Aleida Robinson, his wife, was convicted of one count and received two years probation.

The prosecution sought at trial to demonstrate that the defendants had fraudulently claimed losses on real and personal property destroyed by fire at their Clarksville, Tennessee, home and on business property destroyed by fire at a truck stop leased by Mr. Robinson in Guthrie, Kentucky. The prosecution introduced evidence to show not only that the losses submitted exceeded those actually incurred, but also to imply that Mr. and/or Mrs. Robinson set or caused the fires to be set. Both fires took place under suspicious circumstances in which the Robinsons were allegedly implicated.

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[1] Section 3481 provides as follows:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

The Supreme Court has commented on the legislative history of the statute as follows:

> The legislative history shows that 18 U.S.C. § 3481 was designed, *inter alia*, to bar counsel for the prosecution from commenting on the defendant's refusal to testify.

Griffin v. *California*, 380 U.S. 609, 612 n.4 (1965).

I.

Appellants contend that the following statement by the Assistant U.S. Attorney at the rebuttal stage of closing argument entitles them to a new trial:

> He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

Appellee contends that the statement was properly made because the defense attorney had "baited" the prosecutor by alleging in closing argument that the government had not "played fair" in its investigation and in the course of the trial.[2] The district judge agreed

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[2] The government argues that the following statements by defense counsel during closing argument entitled the government to make reference to the defendant's failure to testify:

> Before I forget, my theme in arguing this case to you, I believe, is going to be that the Government has a duty to be fair. They have a duty to prove their case. And they have a duty to prove it, if they are going to prove it, fairly and squarely. And in this case, they haven't played straight with you members of the jury.
>
> ....
>
> By the way, all those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about these sort of things, about mail fraud?
>
> Did they ever give this man an opportunity in their many, many statements they took at the time to say, "Well, I had two bedroom sets."
>
> ....
>
> ... when he came to Tennessee in October, or shortly after the fire, within a month or so, they interviewed him about the arson.
>
> ....
>
> ... They never gave him a chance to explain.
>
> ....
>
> Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community rather than before the agents?

with the government that the defense had "opened the door" to a comment on the defendants failure to take the stand. Out of the presence of the jury, the judge made the following ruling:

> Yes, Mr. Washko, I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting upon the defendants' failure to testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.
>
> That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury.
>
> We might get reversed on it. Mr. Durham opened the door not less than four times in his argument on that question. I will let you comment on it in response.

Tr. at 681.

The Government also contends that if it was error for the comment to have been permitted, that that error was cured by the court's later instruction to the jury:

> The law does not require a defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a defendant not to testify. The government has

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> Now, here is what the Government, to be fair with the jury, should have done. They should have taken those items in the Kentucky inventory and just proved them. Why let the defendant disprove them, giving him an opportunity to explain?
>
> . . . .
>
> The Government has not brought you all the proof that they should to show you guilt and innocence.
>
> They brought you the type of proof that they carefully filtered, to try to infer [sic] circumstantially the guilt of Mr. Robinson. Shouldn't they have gone through and brought you evidence of more situations where there have been false claims rather than one or two for Kentucky?

Tr. at 658, 670-71, 675, 676.

> the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.
>
> . . . .
>
> The jury will also keep in mind this: The law never imposes upon defendants in criminal cases the burden or duty of calling any witnesses or producing any evidence, and no adverse inference may be drawn from their failure to do so.[3]

In the alternative, the government argues that error, if any, was harmless.

II.

It is clear under *Griffin* v. *California*, 380 U.S. 609 (1965), and *Wilson* v. *United States*, 149 U.S. 60 (1893), that no reference may be made at trial to a defendant's failure to testify. The Supreme Court held in *Griffin*:

> Comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. *People* v. *Modesto*, 62 Cal.2d 436, 452-453, 398 P.2d 753, 762-763. What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

380 US. at 614 (footnote omitted).

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[3] The district judge gave these instructions during the course of his charge, not as a caution to the jury during the Government's closing argument. *See* Tr. at 694, 698.

Appellee contends that there is precedent for permitting a prosecutor to make reference to a defendant's failure to testify, where, as here, defense counsel has accused the Government of not giving his client an opportunity to explain. In *United States* v. *Roberts* 548 F.2d 665, 668-69 (6th Cir. 1977), two defense attorneys explained to a federal jury that they had advised their clients not to testify because two and a half years had elapsed since the robbery, and they could not be expected to recall what they had done on a particular day at a particular time so long ago. The court held that the prosecutor was permitted to rebut with the following statement: "my question to you, or the Government's question to you, is do you think you would remember when you were arrested for bank robbery?" 548 F.2d at 669. Although the court allowed this *indirect* comment, neither *Roberts* nor the other case cited by appellee, *Cook* v. *Bordenkircher*, 602 F.2d 117 (6th Cir. 1979), suggests that a direct comment on a defendant's failure to testify can be made, even if defense counsel has baited the prosecutor. In light of Mr. Robinson's counsel's statements, we can comprehend the desire of the district court to give "equal time," as it were, to the Government, but the action taken was impermissible under the fifth amendment. The error was not cured, moreover, by the court's later jury charge.

The prosecutor's comment in the instant case was an overt reference to the defendants failure to testify, not an oblique reference which reasonably could be construed in any other way. *See Angel* v. *Overberg*, 682 F.2d 605 (6th Cir. 1982) *(en banc)*[4] In this instance it appears that "the prosecutor's manifest intent was to comment on the accused's failure to testify" and "the

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[4] "If two plausible interpretations can be given to a prosecutor's ambiguous final argument, the court should not strive to adopt the one which casts doubt upon the prosecutor's intentions." 682 F.2d at 608.

jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Steele* v. *Taylor*, 684 F.2d 1193, 1204 (6th Cir. 1982). The instant case is therefore distinguishable from *Butler* v. *Rose*, 686 F.2d 1163 (6th Cir. 1982) (*en banc*), in which the court declined to grant a writ of habeas corpus to a petitioner who had been convicted in a state court trial.[5] Furthermore, since the instant case is before the court on direct review, not habeas corpus relief, the standard of review is more stringent. *See United States* v. *Hastings*, ___ U.S. ___, ___; 51 L.W. 4572, 4577 (Stevens, J., concurring).[6] In the instant case the prosecutor's statement was the kind of comment on Mr. Robinson's failure to testify that an inference of guilt

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[5] The following statements were made by the prosecutor at closing argument in *Butler*:

> Well, I submit to you, ladies and gentlemen, that you cannot allow that to happen in this case. Mr. Butler is an instructor and you have got to tell him as an instructor he cannot do this and get away. He cannot do this and just get it back and have an attorney say, "Ah, she is just not telling the truth" without putting one witness to show why she might be telling otherwise or *how* she might be telling otherwise. Apparently what Mr. Ellis is saying is that in a rape case we are just going to always say it is just made up and put on no proof to show why it was made up or anything to indicate the witness is lying in any way and then you just can't convict, couldn't convict in any rape case.

686 F.2d at 1166-67.

> When the alleged infringement consists of statements which do not comment directly on the defendants failure to testify or suggests that an inference of guilt should be drawn from this fact, a reviewing court must look at all the surrounding circumstances in determining whether or not there has been a constitutional violation.

686 F.2d at 1170.

[6] Justice Stevens found a more stringent test to be warranted in reviewing whether a federal criminal conviction is harmless than would be warranted in reviewing a state conviction. The same logic would apply to the first step of determining whether a comment constitutes a *Griffin* error.

was to be drawn therefrom. It was therefore "fundamental error." *Rachel* v. *Bordenkircher*, 590 F.2d 200, 202 (6th Cir. 1978).

III.

In cases involving such direct comments as the one at bar, "the court must reverse unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt." *Raper* v. *Mintzes*, ____ F.2d ____, ____ (6th Cir. 1983). The government contends, without briefing the issue, that the error is harmless. In *Chapman* v. *California*, 386 U.S. 18 (1967), the Supreme Court fashioned the following harmless error rule in the context of a *Griffin* violation:

> [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

386 U.S. at 24. In *Chapman* the Supreme Court found that the comments by the prosecutor were not harmless beyond a reasonable doubt:

> [T]he state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts and evidence had to be drawn in favor of the State—in short, that by their silence petitioners had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, it was also a case in which, absent the constitutionally forbidden comments, honest, fair minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convic-

> tions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession.

386 U.S. at 25-26 (citations omitted).

Just recently in *United States* v. *Hastings*, ___ U.S. ___, 51 L.W. 4572 (1983), the Supreme Court reaffirmed the harmless error doctrine and applied it to uphold a less severe *Griffin* violation. In *Hastings*, the federal prosecutor made reference to the defense's failure to "challenge" critical evidence. The Supreme Court held:

> The question a reviewing court must ask is this: Absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

___ U.S. ___, 51 L.W. at 4575. (citations omitted). Summarizing the evidence the Supreme Court found that "a more compelling case of guilt is difficult to imagine," ___ U.S. at ___, 51 L.W. at 4576, and held the error harmless.

The Sixth Circuit has applied the harmless error rule to *Griffin* violations. The court employed it in *Berryman* v. *Colbert*, 538 F.2d 1247 (6th Cir. 1976) finding that a state prosecutor's improper reference to the failure of the defendant to testify could be considered harmless as to one of the counts of which he had been convicted since the comment principally complained of did not refer directly to that count. The court made clear that it was not relying completely on that distinction, but rather that it was also applying *Chapman* to hold the error harmless as to that particular count. The court found the "overwhelming and undisputed evidence of appellant's guilt" sufficient to find the prosecu-

tor's comment "harmless beyond reasonable doubt." 538 F.2d at 1251.

The Sixth Circuit has since articulated with more particularity the rule to be applied in determining whether a *Griffin* error is harmless. In *Eberhardt* v. *Bordenkircher*, 605 F.2d 275 (6th Cir. 1979), the court examined in detail the analysis to be applied in determining whether such an error is harmless. As the following excerpt indicates, the court applied a very narrow standard:

> Harmless error, in the context of a violation of a consitutional right of a defendant, is an extremely narrow standard, permitting the State to avoid the retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant. *Chapman* v. *California* 386 U.S. 18.

605 F.2d at 278. Some of the factors to be taken into account include the strength of the evidence, the nature of the improper comment, any admonition to counsel, instructions to disregard, and "whether the trial was otherwise relatively error free." *Id.* at 279. *See also Hearn* v. *Mintzes*, ____ F.2d ____ (1983).

When we consider the standards applied in *Eberhardt*, we find that in the instant case, the government has failed to tip the scales as to defendant Thomas Robinson, Jr. While the evidence is strong as to both defendants, it is at least in part circumstantial, and no curative instruction was given at the time of the comment on Mr. Robinson's silence. *See United States* v. *Flannery*, 451 F.2d 880, 882 (1st Cir. 1971). Furthermore, the improper comment was made during the prosecutor's rebuttal—the final chance for either attorney to address the jury. Under these circumstances, we cannot find the error harmless beyond a reasonable doubt as to defendant Thomas Robinson, Jr.

IV.

While it was error for the trial court to have permitted the prosecutor to comment on the failure of one of the defendants to take the stand, we must consider whether that error infected the trial of the other defendant so as to require her conviction to be set aside.

The entire emphasis of the statements made by defense counsel in his closing were on Mr. Robinson's conduct, which the prosecutor, and also the trial court, deemed unfair and baiting. The prosecutor's comment, which we have found to constitute constitutional error, was directed also entirely toward Mr. Robinson. We consider, then, whether the remarks constituted reversible error by also tainting the trial of codefendant Aleida Robinson, who similarly did not testify.

As pointed out, the strong emphasis of the comment held to be a constitutional violation as to Mr. Robinson was that he had indeed been afforded an opportunity to explain the fraud charges. For example, as set out in footnote 2, these references responded to by the prosecutor were among those made by defense counsel in his closing jury argument to Mr. Robinson, but *no allusions were made to Mrs. Robinson:*

> I don't know how many statements we heard of Mr. Robinson.... Did they ever give him a chance to explain ...?
>
> Did they ever give *this man* an opportunity in their many, many statements they took ... to say, "Well, I had two bedroom sets."
>
> ....
>
> ... When *he* came to Tennessee ... they interviewed *him* about the arson....
>
> ....
>
> ... Why let *the defendant* disprove them giving *him* an opportunity to explain?
>
> ....

> They brought you the type of proof that they carefully filtered, to try to infer [sic] circumstantially the guilt of Mr. Robinson.

(Emphasis added.)

Under all these circumstances, we find that the error which occurred was harmless beyond a reasonable doubt on the charges made against Aleida Robinson. Each defendant was on trial separately, and the jury was told that the guilt or innocence of one defendant was not indicative of the guilt or innocence of the other defendant. While the evidence implicated both defendants in the fraud charged, this factor is not sufficient under the particular circumstances recounted to set aside the verdicts as to Mrs. Robinson.

Mrs. Robinson was charged with fraud with her husband and with aiding and abetting him in the commission of fraud. We find distinguishable the cases holding that where comment is made on the failure of one defendant to testify, that misconduct may also be prejudicial to a co-defendant. *Kinser* v. *Cooper*, 413 F.2d 730 (6th Cir. 1969); *Scott* v. *Perini*, 439 F.2d 1066 (6th Cir. 1971). Unlike the situation in *Kinser*, Mrs. Robinson was charged with a substantive offense, and the *Kinser* court observed

> it is not like a *joint indictment* of two persons for a crime where *either one* or *both* may be convicted.

413 F.2d at 732 (emphasis added). Also in the instant case, there was substantial evidence of fraud from a number of witnesses, whereas in *Kinser*, there was essentially the testimony only of the rape victim and the alleged perpetrator of the offense; the comment on the silence of the alleged aider and abettor was therefore particularly significant in that context where the defendant had taken the stand to deny that he was the attacker.

In *Scott*, it was observed that "the prosecuting attorney commented vigorously and at length upon the fail-

ure of Pollard [the co-defendant] to take the stand" and the Judge himself commented on that silence. 439 F.2d at 1067. The defendant who objected in *Scott* to the prosecutor's and the judge's comments on the silence of a co-defendant also himself took the stand, unlike either defendant in the case sub judice. We find these cases not controlling under these circumstances.

Accordingly, we reverse the conviction on all counts of Mr. Robinson, but we affirm the conviction of Mrs. Robinson. The cause is remanded for further proceedings in accordance with this opinion.